STATE OF MICHIGAN

COURT OF APPEALS

STOLL GROUP LLC,

Plaintiff/Counter-Defendant,

v

CRAIG R. COTTRILL, THE ESTATE OF LESLIE R. COTTRILL, THE ESTATE OF FANNIE E .COTTRILL, CATHY J. COTTRILL, and L&C DEVELOPMENT COMPANY INC,

Defendants,

and

CRAIG R. COTTRILL and THE ESTATE OF LESLIE R. COTTRILL,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants/Cross-Appellees,

v

SUNBAY REAL ESTATE INC dba RE/MAX OF ELK RAPIDS and DONALD FEDRIGON JR,

Third-Party Defendants/Counter Plaintiffs-Appellees/Cross-Appellants,

and

KENNETH C FOWLER,

Third-Party Defendant-Appellee.

UNPUBLISHED
May 19, 2015

No. 320763
Antrim Circuit Court
LC No. 12-008776-CH

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

The instant appeal and cross-appeal arise out of a failed real estate transaction. Craig R. Cottrill, the personal representative of the Estate of Leslie R. Cottrill and himself a licensed real estate broker, retained Donald Fedrigon, Jr., another real estate broker and sole owner of Sunbay Real Estate, Inc., to sell certain properties on behalf of the Estate. The ensuing real estate listing included not only those properties, but also several other properties belonging to various Cottrill family members. Significantly, Cottrill signed the listing agreement without reading it and aware that the copy Fedrigon had emailed him was incomplete; he also did not read the property listing itself. Otherwise, the parties dispute the exact nature of their communications with each other. Stoll Group eventually offered to purchase the property as it was listed. The discrepancy between what Cottrill had apparently intended to sell and what was listed in the sales agreement was not discovered until after Cottrill signed that sales agreement, again without reading the list of property parcels attached thereto. The instant litigation ensued. The remaining claims before us on appeal are Cottrill's third-party claims against Sunbay for negligence, breach of contract, and unjust enrichment; and Sunbay's counterclaim against Cottrill for breach of contract. The trial court found in favor of Sunbay, but reduced Sunbay's commission and refused to award attorney fees pursuant to the parties' contract. We affirm in all respects, but remand for the trial court to award attorney fees in an amount that it considers reasonable.

The trial court reviewed the parties' claims under MCR 2.116(C)(8) and MCR 2.116(C)(10). A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. This Court reviews de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

The general rule is "that one who has executed a contract will not be heard to say that he did not read it." *Otto Baedeker & Assoc v Hamtramck State Bank*, 257 Mich 435, 438; 241 NW 249 (1932). Likewise, a party who signs a contract is held to have understood it and cannot contend "that he supposed it was different in its terms." *Shay v Aldrich*, 487 Mich 648, 680; 790 NW2d 629 (2010) (quotation omitted). The only exception to this general rule is if the party was somehow tricked into neglecting to read it. *Id*. at 681. There may be another exception should the contract effectuate a waiver of a constitutional right, but no such situation is present here. See *Aliua v Harrison Community Hosp*, 139 Mich App 742, 749-750; 362 NW2d 783 (1984). Furthermore, an instrument may be reformable should the drafter know that it does not reflect the intention of the other party and what the other party's true intentions are, but such a situation requires proof. *Woolner v Layne*, 384 Mich 316, 318-320; 181 NW2d 907 (1970). There may

also be reasons such as unconscionability or illegality why a contract might be unenforceable, however no such argument is made here, nor do the facts suggest the propriety of one.

By Cottrill's own concession, viewing the evidence in the light most favorable to him, he knew when he signed his assent to the listing agreement that it was incomplete. On its face, the only portion of the contract that can be read as such is the price for which the property should sell, which refers to another document. However, there is no dispute that a meeting of the minds occurred on that point: twice the state-equalized value of the property to be sold. The description of the property does not, on its face, appear either incomplete or incoherent. Whether the parties *actually* failed to have a meeting of the minds as to what property was to be sold, the contract on its face *showed* that a meeting of the minds actually took place. The fact that Cottrill did not read or did not understand the contract before signing it precludes him from contending that it did not reflect his intentions, and the plain language of the property description obligates the courts to accept it on its face.

Cottrill does, however, argue that Fedrigon *knew* that the listing agreement did not reflect Cottrill's intentions. Sunbay points out, reasonably, that Fedrigon could not possibly have hoped to gain anything by disobeying Cottrill's instructions. The evidence tending to show that Fedrigon should have known that Cottrill intended to sell exactly 30 specified parcels is underwhelming, consisting of Cottrill's testimony that he instructed Fedrigon that he intended to sell only his father's properties and an envelope containing either 28 or 30 property tax printouts. However, he also testified that he had initially been "vague" about ownership of the properties, and a list of parcels provided without context proves nothing about its intended significance. Cottrill otherwise relies on having signed "executor" on various documents, but it requires considerable imagination to extrapolate from that an intention of selling less property than the evidence suggests Fedrigon genuinely believed.

Furthermore, Cottrill simply cannot escape the fact that he actually signed the list of 38 parcels as part of the purchase agreement. Cottrill claims that he had only a few minutes, but admitted that he signed without reading it because he trusted that it was only a list of 30 parcels. There is simply no legal basis present for Cottrill to evade the rule that a party who signs a contract is charged with knowledge and understanding of the contents of that contract. Even if Fedrigon committed some kind of negligence by failing to verify that Cottrill had actually received everything[1] or by failing to list only 30 parcels, Cottrill committed himself to the contracts by signing them without reading them.

In *Zaremba Equipment Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 25-27; 761 NW2d 151 (2008), this Court, in the context of an insurance agent's duty to advise an insured as to the adequacy of an insurance policy, held that the agent ordinarily has no such duty because the

[1] Sunbay conceded that at least some documents were emailed to an incorrect address and, consequently, Cottrill really did not receive all of them. Fedrigon also admits that he failed to provide Cottrill with an agency disclosure statement, but despite Cottrill making much of that particular failure, he wholly fails to articulate how the absence of such a disclosure statement caused him any damages.

insured is obligated to read the policy. However, an exception to the general rule exists where a "special relationship" has been created between the agent and the insured. *Id*. at 27-28. Cottrill argues that a fiduciary relationship existed between himself and Fedrigon, which must surely be sufficient to impose upon Fedrigon a duty to affirmatively advise Cottrill of the contents of the agreements, displacing and supplanting any duty Cottrill might have had to read them. We disagree. The examples of situations giving rise to such a "special relationship" entail the agent affirmatively misleading the insured, failing to respond to an ambiguous request, or undertaking an additional obligation. *Id*. at 28, quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 10-11; 597 NW2d 47 (1999). No such situation occurred here. However, *Zaremba* is not entirely analogous, because an insurance agent is a fiduciary of the insurer, not the insured. *Harts*, 461 Mich at 6-7.

Nevertheless, it is well established that, in the absence of fraud,[2] insurance policies are indistinguishable from any other contract insofar as a party thereto is held to know and understand the contents and cannot defend against it on the basis of ignorance or having failed to read it. See *Cleaver v Traders' Ins Co*, 65 Mich 527, 532-533; 32 NW 660 (1887). Cottrill asserts that the trial court should not have imposed a "failure to read" defense, but "failure to read" *is* in fact an absolute defense unless Cottrill can assert, *inter alia*, that Fedrigon induced him to sign on the basis of fraud. To the extent Cottrill asserts that Fedrigon deliberately "set him up" by disobeying orders to list on 30 parcels instead of 38, Sunbay reasonably notes that Fedrigon could not have hoped to gain anything by doing so, and otherwise the most that can be said is that a glaring miscommunication transpired.

In any event, "negligence is not fraud[: n]egligence is founded upon the failure to use due care, while fraud requires an intentional perversion or concealment of the truth and reliance thereon." *Johnstons' Administrator v United Airlines*, 23 Mich App 279, 286; 178 NW2d 536 (1970). Cottrill seeks to avoid the consequences of having signed a contract that he did not read and did not understand by asserting negligence on the part of the other party. Even if Fedrigon was negligent, which there is some evidence tending to show, Cottrill had the ability to ascertain whether he was signing a complete and correct contract but failed to do so, and it is basic and fundamental contractual law that he is bound thereto. Comparative negligence has no relevance in this matter because negligence itself is of no relevance.

Cottrill also relies on the fact that the property listing inaccurately stated that the property lacked water frontage, despite the fact that he directly asked Fedrigon whether any of the property had water frontage. "Courts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume." *Baker v Arbor Drugs Inc*, 215 Mich App 198, 205; 544 NW2d 727 (1996). Cottrill indicated that he had "five or six" communications with Fedrigon between their initial meeting and the preparation of the listing agreement, and was only able to say that "at one point I asked him to make sure we don't have any water frontage." Cottrill explained that he "didn't know the property that well," but he believed Fedrigon did, and he was concerned because his father had given him inconsistent

[2] Or, presumably, any other legally recognized basis for avoiding a contract.

accounts of whether any of the property had water frontage. However, it is *not* readily apparent *when* Cottrill made that request, and indeed, Cottrill's testimony indicates that after their initial meeting, he only had a vague understanding that Fedrigon was "going to try and familiarize himself more with the properties," and did not "know if he was going to do more work online or walk them or whatever." Consequently, there is some evidence in the record that Cottrill asked Fedrigon to assess whether any of the properties had water frontage, but it is not clear when or under what circumstances that request was made.

In any event, not all undertakings that would benefit another are sufficient to give rise to the duty Cottrill asserts. See *Cunningham v Continental Casualty Co*, 139 Mich App 238, 241-243; 361 NW2d 780 (1984). Moreover, any such duty would be construed narrowly and limited not only to specifically what the actor in question actually promised, but also to what the other party could reasonably and sensibly expect. See *Scott v Harper Recreation Inc*, 444 Mich 441, 448-452; 506 NW2d 857 (1993). A duty will not arise unless the actor agreed or intended to act for the purpose of the other party's benefit and not primarily for the actor's own. *Cunningham*, 139 Mich at 242, citing *Smith v Allendale Mut Ins Co*, 410 Mich 685, 715-717; 303 NW2d 702 (1981). Finally, the imposition of a duty upon a person as a consequence of that person voluntarily undertaking some action is premised on a principle that sounds in negligence. *Zine v Chrysler Corp*, 236 Mich App 261, 277-278; 600 NW2d 384 (1999).

The latter point is critical, because as to the water frontage issue, Cottrill does not really assert that Fedrigon was *negligent* so much as *wrong*. Proof of negligence solely on the basis of an adverse outcome is *res ipsa loquitur*, under which, at a minimum, it must be proven through expert testimony or within common knowledge that the adverse outcome generally does not happen in the absence of negligence. *Woodard v Custer*, 473 Mich 1, 6-8; 702 NW2d 522 (2005). Cottrill does not even attempt such proofs, but quite simply directly leaps from asserting that "Fedrigon was required to perform that duty carefully and with skill," to "which he did not" for the sole reason that Fedrigon "failed to identify that certain parcels do, in fact, have water frontage." This argument does not sound in negligence and does not even rise to the level of a *res ipsa loquitur* argument, but rather presumes that the existence of a duty of care imposes upon the actor the responsibilities of a *guarantor*, which the case law uniformly holds such actors not to be. Nor is a lack of care obvious from the facts, which are that Fedrigon looked at the official tax data on the properties for any notation of water frontage, for which any properties would ordinarily be subject to an additional tax burden. Although it would normally be a question of fact whether an actor breached a duty once that duty is established, Cottrill's failure to allege anything other than a failure to be *correct* dooms this argument.

Cottrill instead relies on a negligence per se argument, asserting that Fedrigon violated MCL 339.2512d(2)(e), under which "A real estate broker or real estate salesperson acting pursuant to a service provision agreement owes, at a minimum, the following duties to his or her client . . . Referral of the client to other licensed professionals for expert advice related to material matters that are not within the expertise of the licensed agent." Sunbay correctly counters that Fedrigon was not under a service provision agreement. Pursuant to MCR 339.2501(j), "'Service provision agreement' means a buyer agency agreement or listing agreement executed by a real estate broker and a client that establishes an agency relationship." It is unambiguous from Cottrill's testimony that all of the discussions concerning water frontage took place before any formal agreement was entered into between the parties. Cottrill asserts

something akin to a "continuing wrong" argument, but it appears that Cottrill did not inquire further into the issue.

Cottrill next argues that Sunbay is not entitled to a commission because he had a good cause to refuse to complete the sale, relying on *Advance Realty Co v Spanos*, 348 Mich 464, 468-469; 83 NW2d 342 (1957). Cottrill misreads the case. In that case, our Supreme Court stated that the broker is entitled to a commission "if the owner wrongfully refuses to complete the sale." *Id*. Cottrill apparently reads this case as implying that if the owner refuses to complete the sale, and doing so was not wrongful, then no commission may be owed. However, the cases relied upon by our Supreme Court suggest otherwise. In one, our Supreme Court held that it was well-established that such commissions do not depend upon completed sales, but implied that the broker might not be so entitled if the broker neglected to inform the seller about the acquired purchaser. *Blakeslee v Peabody*, 180 Mich 408, 411-412; 147 NW 570 (1914). In the other, our Supreme Court explicitly held that only the *purchaser*'s refusal or inability to complete the sale would defeat the broker's right to the commission. *Hooley v Alpena Nat'l Bank*, 256 Mich 269, 271-272; 239 NW 266 (1931). In any event, we do not believe that Cottrill's decision not to fully read the contracts he signed constitutes a "good reason" to refuse to complete a sale.

On cross-appeal, Sunbay contends that the trial court should have awarded it attorney fees, as specified in the parties' contract. Sunbay concedes that we review a trial court's decision whether to award attorney fees for an abuse of discretion, even where the attorney fees are specified by a provision in a contract. *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996). However, we agree with Sunbay's argument that despite the applicability of the abuse of discretion standard, "the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *First Security Savings Bank v Aitken*, 226 Mich App 291, 319; 573 NW2d 307 (1997), overruled on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999) (quotation omitted).

We conclude that it was an abuse of discretion to award *no* attorney fees where the contract unambiguously calls for their imposition. Notwithstanding the trial court's discretion, the trial court's decision to reject an award of attorney fees *entirely* would be totally contrary to the plain language of the contracts at issue, presuming Sunbay constitutes the "prevailing party." The trial court retains discretion to determine the *amount* of those fees, which it may very well conclude should be nominal. However, it does not have the discretion under the circumstances of this case to award *no* fees.

The various contracts do not define "prevailing party." Within the meaning of MCR 2.625(B)(2), which governs taxation of costs, this Court has held that a party may be a "prevailing party" even if the party did not recover as much damages as was sought. *McMillan v Auto Club Ins Ass'n*, 195 Mich App 463, 466-467; 491 NW2d 593 (1992). Under that rule, a party is "prevailing" if the party improved its position as a consequence of the litigation. *Fansler v Richardson*, 266 Mich App 123, 128; 698 NW2d 916 (2005). This Court has also applied the same principle to the definition of a "prevailing party" under MCL 600.2591(3)(b), where it is defined as "a party who wins on the entire record." *Van Zanten v H Vander Laan Co Inc*, 200 Mich App 139, 140-142; 503 NW2d 713 (1993). Cottrill correctly points out that neither the statute nor the court rule are directly applicable per se, but it is nonsensical to assert that the principles behind this Court's holdings are not. A party need not obtain all relief sought to be

"prevailing," but rather must only obtain relief that is meaningful. Therefore, the trial court erred in finding that Sunbay was not a prevailing party.

We therefore affirm in all respects other than the trial court's decision not to award attorney fees. We remand for the trial court to impose attorney fees in an amount it deems reasonable. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan